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No. 1047.

IN THE

SUPREME COURT OF THE UNITED STATES

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent's Estoppel Argument

For the first time in this proceeding respondent now argues at pages 4, 9 and 13 of its brief that because the Federal Power Commission license which petitioner accepted provided for annual license charges, its acceptance of the license estops it from claiming exemption from all or any part of such charges pursuant to the provisions of the Federal Power Act.

As originally issued Article 27 of the license contained a boiler-plate provision with respect to annual charges of the type placed in all licenses issued at the time petitioner's St. Lawrence license was issued. Petitioner like other licensees accepted it without waiving any rights under the statute. The provision read:

> "*Article 27.* The Licensee shall pay to the United States the following annual charges:
>
> For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one (1) cent per horsepower on the authorized in-

> stalled generator capacity (computed at 1,250,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made."*

At the time petitioner accepted the license it had no standing to claim exemption pursuant to § 10(e) of the Act on any of the grounds provided by that subdivision. Respondent's Regulations 11.24(i) and 11.31, which prescribe the methods by which exemption may be claimed, require a licensee to wait until charges are actually billed before filing an application for exemption. In addition respondent's Regulation 11.24(b) specifically provides that no licensee shall be entitled to exemption on the ground that a project is primarily designed to provide or improve navigation unless it

> "establishes that fact from the actual conditions under which the project was constructed and was operated during the year for which the charge is made."

If respondent were correct in the position it now takes to the effect that petitioner is estopped from claiming exemption because it did not do so prior to accepting its license there would have been no point whatever in respondent's taking the actions it has taken with regard to petitioner's application for exemption, *i.e.*, in (i) assigning the application to an examiner, (ii) having a hearing held by the examiner, (iii) rendering decision on the merits in which estoppel was not mentioned, and (iv) granting partial exemptions.

Respondent cites two cases to sustain its estoppel argument (*Callanan Road Co.* v. *United States*, 345 U. S. 507, 512-13; *Central Nebraska Public Power & Irrigation District* v. *Federal Power Commission*, 160 F. 2d 782, 784).

Neither of those cases is in point.

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* As stated below the original provision was eliminated and a new one substituted in 1960.

In *Central Nebraska* there was no suggestion whatever in the court's opinion that it considered the Nebraska District estopped from claiming exemption pursuant to § 10 (e) because it had accepted a license providing for the payment of annual charges.

In *Callanan* the petitioner, in a collateral proceeding, sought to attack a Certificate of Necessity which had been granted to its predecessor and later transferred to the petitioner which for some time had been operating under it. Thus the petitioner was seeking to invalidate the very Interstate Commerce Commission franchise under which it was operating. That is not the situation here. Neither the provision of petitioner's (Power Authority's) license relating to annual charges which was in the license as issued on July 15, 1953 nor the substitute provision placed in it on September 9, 1960 pursuant to the Acts of August 15, 1953 and July 31, 1959 (67 Stat. 587; 73 Stat. 271) is challenged by petitioner.

Since being amended Article 27 reads as follows:

> "*Article 27.* The Licensee shall pay to the United States the [following] annual charges:
>
> For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge in accordance with the provisions of Part II of the Commission's Regulations (18 C. F. R. 11.20 (b)). The authorized installed capacity for such purpose is 1,216,000 horsepower."

This language is taken right out of the Act of August 15, 1953 (67 Stat. 587) which reads in part:

> "The Federal Power Commission in determining the amount of annual charges applicable to any such project may determine the annual charges with reference to the actual cost of services incurred by the Commission with respect to the project."*

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* The August 15, 1953 statute was enacted exactly one month after petitioner's license was issued but several months before it was accepted. While it did not technically amend the Federal

(Footnote continued on next page)

Petitioner rather than challenging the validity of that license provision is merely asking for the exemptions to which it is entitled pursuant to § 10(e) of the Act.

Obviously the provisions of the license which require that reasonable charges be paid apply only to so much of the output of the project, if any, as is not exempt on one of the grounds set forth in § 10(e).

Respondent's Congressional Acquiescence Argument

At page 13 respondent's brief says:

> "* * * Although Congress has subsequently amended Section 10(e), it has not disturbed the Commission's interpretation of the 'without profit' clause. See Pub. L. 87-647, 76 Stat. 447. In view of this Congressional acquiescence, the administrative interpretation has acquired the force of law.* * *"

Power Act it made several statutory changes which affected the provisions of the Act and nullified some of them. For example the 1953 statute provided that § 14 of the Act pertaining to the taking over by the United States of licensed projects upon expiration of licenses should not apply to municipalities. The 1953 statute however specifically provided that the benefits provided by it would not apply to

> "any license issued for a hydroelectric development in the International Rapids section of the Saint Lawrence River."

This proviso was placed in the statute at the behest of interests who hoped that insertion of a recapture provision in the license for the project would prevent petitioner from accepting it. On July 31, 1959 after the project had been built a statute was enacted (73 Stat. 271) removing the St. Lawrence exception from the 1953 statute. It was after that that Article 27 of petitioner's license was amended by the Commission. Petitioner which sponsored the 1959 legislation did not ask Congress to make any other change in the 1953 statute or to amend the Power Act. At that time (1959) petitioner had applied for exemption from annual charges on the grounds which are the subject of the present litigation and took the position which it takes now that under existing law it was entitled to such exemptions and hence that no statutory changes were necessary.

The amendment to the Act cited by respondent had nothing whatever to do with the "without profit clause". All it involved was a change in the size of projects entitled to exemption from various licensing provisions. From the time it originally went into effect the Act exempted projects of 100 horsepower or less from various requirements. All the statute cited by respondent—which was enacted in 1962—did was to increase the size of projects thus exempt from 100 horsepower or less to 2,000 horsepower or less.

The legislation was sponsored by respondent which advised Congress that there were 700 small projects in operation which were required under the law to be licensed but which were not. Respondent was carrying on a campaign to get them licensed and asked for the legislation on the theory that by making the license requirements less onerous it could get more of them to comply with the law.

There is nothing in the legislative history of the statute nor any suggestion in any other quarter that the attention of Congress was brought to the provisions of the Act relating to exemptions from annual charges based on the sale of power without profit. (H. Rept. No. 2241, 87th Cong. 2d Sess.)

There were no circumstances surrounding the 1962 amendment to the Act nor surrounding the passage of prior legislation affecting the Act indicating any intention on the part of Congress to acquiesce in any interpretation of the provisions of the Act made by respondent let alone respondent's interpretation of the exemption provisions of § 10(e).

Some Misleading and Erroneous Statements in Respondent's Brief

Respondent's brief at page 6 states:

> "Petitioner (the 'Power Authority') claims an exemption under that provision on the ground that the International Rapids development as a whole, including those portions constructed by other entities, both public and *private*, was designed primarily to aid navigation." (Emphasis supplied.)

No part of the St. Lawrence project was constructed by a private entity. Petitioner never suggested that it was. The greater part was constructed by a New York State entity and an entity of the Province of Ontario. The balance was constructed by a United States federal corporation and a Canadian federal authority.

At the bottom of page 6 and the top of page 7, the brief states:

> "* * * A 'project' is defined in Section 3(11) of the Act (16 U. S. C. 796(11)) as a 'complete unit of improvement or development.' The Commission found that the hydroelectric works licensed to the Power Authority qualified as a 'project' within that definition, since the record on the original license application showed (a) that the Power Authority 'fully intended to have the hydroelectric works in operation, to provide needed power, long before the navigation facilities of the St. Lawrence Seaway were completed'; (b) that the works 'were intended to be a complete and operating unit in themselves'; and (c) that all parties concerned 'regarded the Authority's works as a project in themselves' (A. 228-229). These findings* are supported by the evidence and therefore conclusive."

It is completely untrue that the Power Authority intended to have the hydroelectric works in operation before the navigation facilities were completed and there is absolutely nothing in the record to support that statement.

The project was designed and built as a whole because that was the only way to design and build it. It would have been virtually impossible to design and extremely improvident to build one phase of the project at a time because so many project works were necessary both for navigation and power.

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* In the Commission's opinion statements along these lines were made but those statements actually were not included in the findings.

The raising of the pool behind the dams necessarily flooded out the 14-foot navigation facilities on the Canadian side. If the new navigation facilities had not been ready when the pool was raised there could have been no navigation in the St. Lawrence River at all. There was never a time when such a situation was contemplated by anyone in any quarter.*

The finding "* * * that the works 'were intended to be a complete and operating unit in themselves'; * * *" when applied only to the facilities licensed by the Commission is so obviously absurd that it requires no refutation. Of course there is nothing in the record to sustain it.

The finding "* * * that all parties concerned 'regarded the Authority's works as a project in themselves' * * *" is demonstrated to be completely wrong in the opinion of the District of Columbia Circuit sustaining the license in *Lake Ontario Land Develop. Etc.* v. *F. P. C.*, 212 F. 2d 227. The opinion shows clearly that the parties concerned did not so regard the project works. The finding of course has no support in the record.

Despite the fact that the petition clearly demonstrates its falsity the brief at page 10 says:

> "The only project works constructed by the Power Authority were those solely for power and those common to power and navigation; * * *"

The only citations in the brief in support of these statements are references to an examiner's report. The brief makes no citation to testimony or other evidence to sustain those propositions and indeed could not because no such material exists.

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* Actually navigation was suspended only between July 1, 1958 when the raising of the pool was commenced and July 4, 1958. The new navigation facilities including those constructed by the power entities and those constructed by the navigation entities were then put into use. (St. Lawrence Seaway Development Corporation, 1958 Annual Report, page 24).

In a footnote it points out that the petition asserts that the main emphasis in the history of the development was on navigation, that the works needed solely for power accounted for only one-fifth of the Authority's total construction costs, that the Iroquois Dam which the Authority built both in the United States and Canada and the cost of which the Canadian power entity shared was of no value for power, that other works constructed by the power entities would have been built differently and more cheaply if constructed for power purposes alone and that the project is operated primarily for the benefit of navigation. However the footnote goes on very unfairly to state:

> "All of these contentions were carefully considered by the court below and either rejected or found inconclusive (Pet. 8a-9a)."

The court below did not "reject" any of these assertions. There was no possible basis for its doing so because they are true.

What the court below did was to say:

> "Assuming that all these contentions are true, again they need prove no more than that ease of shipping is an important secondary value of the project and at times should be given the right of way. The Commission was not required to regard these contentions as conclusive of the fact that the project was designed primarily for navigation." (Pet. p. 9a).

As pointed out in the petition the court below was wrong in failing to give weighty consideration to those facts and in the light of those and other uncontested facts to review on the merits the issue of whether or not the project was primarily designed to provide or improve navigation.

Respondent's brief (p. 11) attempts to explain away the obvious inconsistency in the Commission's Regulation 11.24(d) which includes amortization as an element of expense and then specifically excludes amortization of in-

debtedness as such an element with the following statement:

> "Amortization, as that term is used in the regulation, refers to the gradual write-off of assets such as limited-term franchises, licenses, patent rights, limited-term interests in land, etc." (p. 11, fn. 6).

This statement offered without citation is purely gratuitous with nothing whatever to sustain it.

At page 12 respondent's brief says:

> "The examiner found (A. 209) that the appropriate depreciation rate on petitioner's plant is 1.25% per annum—a rate which permits recoupment of the original investment over an eighty year period."

There was no issue at the hearing with respect to depreciation. Petitioner did not claim credit for depreciation. The only testimony on the subject was placed in the record by a Commission employee who had not the remotest qualifications to testify as an expert on the subject. However his conclusions have no bearing whatever on the problems involved in this litigation.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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